No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

CLAYTON BYRD, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tennessee Wine and Spirits Retailers Association. Petitioner is not the subsidiary or affiliate of any publicly owned corporation. No publicly owned corporation owns 10% or more of Petitioner's stock.

Respondents are Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines and Spirits, LLC, d/b/a Total Wine Spirits Beer & More; and Affluere Investments, Inc., d/b/a Kimbrough Fine Wine & Spirits.

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OPINIONS BELOW

The District Court's opinion granting summary judgment to Respondent Tennessee Fine Wines (Pet.App. 57a–81a) is published at 259 F. Supp. 3d 785 (M.D. Tenn. 2017). The Sixth Circuit's divided decision affirming that judgment (Pet.App. 1a–56a) is published at 883 F.3d 608 (6th Cir. 2018).

JURISDICTION

The Sixth Circuit entered judgment on February 21, 2018. On April 26, 2018, Justice Kagan extended the time to file a petition for certiorari to and including July 21, 2018. No. 17A1186. On July 20, 2018, Petitioner filed its petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Twenty-first Amendment of the United States Constitution provides that "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

2. The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

3. Section 57-3-204(b) of the Tennessee Code Annotated, which addresses the issuance of licenses for the retail sale of alcoholic beverages, provides, in relevant part:

(2) No retail license under this section may be issued or transferred to or held by, to any individual:

(A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years;

. . .

(3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to, transferred to, or maintained by any corporation unless such corporation meets the following requirements:

(A) No retail license shall be issued to, transferred to, or maintained by any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;

(B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of

the state for the two (2) years immediately preceding the date application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;

. . .

(D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

(4) It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the com-

> mission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

INTRODUCTION

The debate about alcohol's place in society is as old as the country. The first president once denounced alcohol as "the source of all evil—and the ruin of half the workmen in this Country." George Washington, Letter to Thomas Green (Mar. 31, 1789). The second "enjoyed a tankard of hard cider with his breakfast every morning." Thomas R. Pegram, BATTLING DEMON RUM 8 (Ivan R. Dee 1998). Other Americans have seen the glass half-empty *and* half-full. The same F. Scott Fitzgerald who is said to have toasted, "Here's to alcohol, the rose colored glasses of life," is also credited with noting, more soberly: "First you take a drink, then the drink takes a drink, then the drink takes you."

The controversy persists because alcohol is not an ordinary article of commerce—it is both widely enjoyed and dangerously misused. What do you do with something like that? Centuries of experience confirm that there is no right answer; every approach, ranging from *laissez faire* to absolute prohibition, comes with tradeoffs. Weighing them necessarily depends on difficult value judgments and conditions that vary from time to time and place to place.

Because striking the right balance requires appreciation of regional factors, it makes sense to leave the regulation of alcohol to state and local officials. After all, those closest to a community are best positioned to understand its needs. In general, that is precisely what our Constitution does. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New*

State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Constitution enshrines the difference between alcohol and ordinary articles of commerce—and guarantees states the opportunity to experiment with alcohol regulation—in the Twenty-first Amendment. Section 2 of the Amendment prohibits "[t]he transportation or importation" of "intoxicating liquors" into any state "for delivery or use therein . . . in violation of the laws thereof." This section "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts"—two pre-Prohibition laws, still on the books today, that give the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm v. Heald*, 544 U.S. 460, 484, 488 (2005).

Consistent with that grant of authority—first given by statute, and now enshrined in the Constitution—states are unfettered by the dormant Commerce Clause when they exercise their "core § 2 power": the power "directly to regulate the sale or use of liquor within [their] borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984). Put another way, state laws regulating in-state distribution of alcohol "are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489.

This case asks whether Tennessee violated the dormant Commerce Clause by limiting retail liquor licenses to individuals who have resided in Tennessee for the previous two years, and to corporations whose directors and officers satisfy the same requirement.

The principles above answer that question: Because Tennessee's durational-residency requirement regulates in-state distribution and treats "liquor produced out of state the same as its domestic equivalent," it is "protected under the Twenty-first Amendment." The Court should therefore hold that the law is a valid exercise of Tennessee's "core § 2 power" to directly "regulate the sale or use of liquor within its borders," and reverse the Sixth Circuit's contrary ruling.

STATEMENT

The temperance movement emerged in the early-to-mid 1800s. In fits and starts, it promoted sobriety, regulation, and eventually the national prohibition of alcohol. State legislatures and Congress passed numerous laws in response to these efforts, and this Court frequently determined the constitutionality of those laws. This legal history provides context that is critical for understanding the Twenty-first Amendment. This section begins with this historical context, before turning to the procedural history of this case.

1. States experimented with various alcohol-related regulations throughout the 1800s. And this Court's cases addressing those experiments reveal the uneasy consensus that had emerged by the turn of the century. On the one hand, the states could regulate alcohol sales ***within their borders***, at least so long as they did not discriminate against alcohol produced out of state. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898). On the other hand, the states could not regulate the sale or transportation of liquor ***across state lines***; the Commerce Clause left that task to the federal government alone. *Id.* at 424.

This division of authority posed a serious problem from the temperance movement's perspective. Laws banning the in-state sale or consumption of alcohol were of little use if states were powerless to stop cross-border transactions. Congress addressed this concern in 1913 when it passed the Webb-Kenyon Act. That law gave the states almost complete authority to regulate the sale and use of alcohol by making it illegal to transport liquor into a state where its consumption or sale would be illegal. *See* W. J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 Yale J.L. & Human. 285, 291–92 (1996) (reviewing Richard F. Hamm, SHAPING THE EIGHTEENTH AMENDMENT (1995)).

The temperance movement wanted more: a complete, nationwide prohibition of alcohol sales. *See id.* at 292; K. Austin Kerr, ORGANIZED FOR PROHIBITION 139–41 (Yale Univ. Press 1985). It succeeded on January 16, 1919, when the states ratified the Eighteenth Amendment, prohibiting "the manufacture, sale, or transportation of intoxicating liquors within," and "the importation thereof into . . . the United States." U.S. Const. amend. XVIII, § 1.

Prohibition was supposed to end the use of alcohol and curb its attendant social ills. It didn't. Instead, the public became all the more "intrigued with alcohol and drinking because the sale of booze was forbidden." *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 855 (S.D.N.Y. 1985). And the lack of a lawful distribution channel "spawned a violent and unruly organized crime industry to satisfy appetites for alcohol." *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 939 (6th Cir. 2014). The result was unsustainable. *See Loretto*, 601 F.Supp. at 856.

So, in 1933, the American people met in state conventions and ratified the Twenty-first Amendment. The Amendment's first section ended Prohibition by repealing the Eighteenth Amendment. Its second section vested authority to regulate alcohol in the states, prohibiting the "transportation or importation into any State, . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof."

The vast majority of states responded by legalizing the sale and use of alcohol to some degree. *See* Robert H. Skilton, *State Power Under the Twenty-First Amendment*, 7 Brook. L. Rev. 342, 345 & n.14 (1938). But the concern for public safety remained, especially given the "huge, sprawling, and illegal industry for producing and distributing alcoholic beverages" that "already existed." Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, Contemp. Drug Probs., Spring 1985, 63, available at https://tinyurl.com/ybdbzphs. The states that legalized alcohol thus assumed the "responsibility to render tolerable, if not entirely harmless, the newly restored commerce in these potentially dangerous commodities." Leonard V. Harrison & Elizabeth Laine, AFTER REPEAL 42 (Harper & Bros. 1936).

Most states tried to manage these problems through "three-tier systems." These systems divided the industry into producer, wholesaler, and retailer levels, and required that all consumer sales pass through this distribution chain. Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* Social and Economic Control of Alcohol: The 21st Amendment in the 21st Century 31, 33–34 (Carole L. Jurkiewicz & Murphy J.

Painter, eds., 2008). The states then separately licensed participants at each level.

When it came to retailers, these licensing requirements "strictly circumscrib[ed] the ability of private interests to sell and distribute liquor within state borders." *Granholm*, 544 U.S. at 517 (Thomas, J., dissenting); Skilton, 7 Brook. L. Rev. at 349–50. For example, many states "limit[ed] the issuance of retail . . . licenses to residents of the state or to domestic corporations." Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1148 (1959).

In addition to allowing only residents to sell alcohol, states often required "a fixed period of prior residence." *Id.*; *see, e.g.*, 1937 Ga. Laws 103 § 24; Ky. Rev. Stat. § 243.100(3) (1942); N.C. Gen. Stat. § 3411(103)(1½) (1939); N.J. Rev. Stat. § 33:1-25 (1937); Ohio Rev. Code. Ann. § 6064-17 (1936); Vt. Stat. Ann. tit. 28, ch. 271, § 6156 (1947); Wis. Stat. § 176.05(9) (1937); Wyo. Comp. Stat. § 53-204 (1945). These requirements provided states a genuine "opportunity to determine [a license applicant's] fitness," and created "a bar against undesirable nonresidents coming into the state for the sole purpose of" selling alcohol. *Hinebaugh v. James*, 192 S.E. 177, 178 (W.V. 1937). These laws also ensured that each applicant was and would remain "amenable to the direct process of state courts." *Id.*

The states' licensing of wholesalers served a related but distinct purpose. In the years before Prohibition, brewers took control of local saloons, setting them up in exchange for a fee and the promise to sell only their beers. Pegram, BATTLING DEMON RUM at

94–95. This "tied-house system" resulted in an abundance of saloons that competed hard for profits—driving down prices and encouraging saloonkeepers to promote overconsumption and illegal use. *Id.* at 96–97; Kerr, ORGANIZED FOR PROHIBITION at 23–24. The three-tier system helped prevent this by "interposing a wholesaler level between the supplier and retailer." Lawson, *The Future of the Three-Tiered System* at 33. "The wholesaler was intended to be a local, almost exclusively family-owned business that would spend years and a great deal of capital developing its business," giving it "a strong incentive to avoid regulatory sanctions" and to be seen as a "good corporate citizen[]." *Id.* This introduced a second local actor (in addition to the retailer) between the consumer and the producer, whose concern for the community would further tame "the forces that promote intemperance." *Id.* at 31.

2. In 1939, Tennessee legalized the sale of alcohol. The same bill created a three-tier system with retailers subject to a two-year residency requirement. 1939 Tenn. Pub. Acts, ch. 49, §§ 5–8.

The state legislature has amended the licensing law many times since, but the two-year residency requirement remains. Under § 57-3-204(b)(2)(A) of the Tennessee Code, "[n]o retail license . . . may be issued . . . to any individual . . . [w]ho has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made." Corporate entities cannot obtain a license "if any officer, director, or stockholder owning any capital stock in the corporation" fails the requirements applicable to individuals. *Id.* § 57-3-204(b)(3)(A). The legislature later codified its reasons

for these requirements: Because it is important to "maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of" licensed retailers, "it is in the best interest of the health, safety and welfare of [Tennessee] to require all licensees to be residents." *Id.* at § 57-3-204(b)(4).

3. Petitioner, Tennessee Wine and Spirits Retailers Association, represents Tennessee liquor retailers. In 2016, it learned that a business with an out-of-state address—Respondent Tennessee Fine Wines and Spirits, LLC, which refers to itself as "Total Wine"—had applied for a retail liquor license. Because Total Wine did not satisfy Tennessee's durational-residency requirement, the Association notified the State that the application should be denied. Pet.App.3a–4a.

Fearing litigation, Tennessee filed a state-court declaratory-judgment action in the name of Clayton Byrd (the Executive Director of the state liquor licensing commission) against the Association, Total Wine, and another applicant with out-of-state owners, Affluere Investments, Inc. Pet.App.4a. Byrd asked the court to resolve whether the Twenty-first Amendment allowed Tennessee to enforce its durational-residency law, despite any dormant Commerce Clause problems that such a law might otherwise create. Pet.App.4a.

The Association removed the case to federal court and, along with Tennessee, defended the law. Pet.App.4a & n.1. Tennessee and the Association argued (among other things) that the durational-residency requirement comported with this Court's Twenty-first Amendment precedents, including its latest: *Granholm v. Heald*, 544 U.S. 460. That case

invalidated state laws allowing only in-state producers—as opposed to out-of-state producers—to sell wine directly to consumers. *Id.* at 493. But in reaching this holding, the Court recognized that three-tier systems are "unquestionably legitimate" under the Twenty-first Amendment, which "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality op.)). Tennessee and the Association argued that because Tennessee's three-tier scheme "treat[s] liquor produced out of state the same as its domestic equivalent," that scheme—including its key durational-residency requirement—is "protected under the Twenty-first Amendment." *Id.* at 489.

The District Court struck down the law. It first dismissed the relevant language in *Granholm* as "dicta." Pet.App.65a. While the court acknowledged the constitutionality of three-tier systems in the abstract, it read *Granholm* to mean that, although the dormant Commerce Clause applies "to a lesser extent" to laws that "deal with the retailer or wholesaler tier," "[d]istinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." Pet.App.70a–71a, 73a. Because the District Court believed that Tennessee's two-year durational-residency requirement was insufficiently "inherent" in that system, it concluded that the requirement could not be justified by the Twenty-first Amendment. Pet.App.73a–76a.

The District Court also held unconstitutional, on identical grounds, two other aspects of the Tennessee

law. First, it struck down a provision authorizing license renewals only for individuals who have been residents for ten years. Second, it struck down the requirement that all directors, officers, and stockholders of a corporate applicant satisfy the two-year residency requirement for initial applications and the ten-year requirement for renewals. Pet.App.29a–33a.

4. A divided panel of the Sixth Circuit affirmed. The majority concluded that, even though *Granholm*'s inquiry focused on out-of-state liquor, the decision is better understood as an application of traditional dormant Commerce Clause principles, which forbid discrimination against out-of-state economic interests generally. Pet.App.17a–23a. And since Tennessee's durational-residency law treats out-of-state economic interests differently from in-state economic interests, the court applied traditional dormant Commerce Clause scrutiny. Tennessee's law failed that test, in the majority's view, because the state could have pursued its interests in promoting the public welfare through less discriminatory means. *See* Pet.App.29a–33a (suggesting the state could impose residency requirements just on retailers' "general manager[s]," require "both in-state and out-of-state retailers to post a substantial bond," or require "public meetings" before issuing a license).

Judge Sutton dissented in relevant part, concluding that the two-year durational-residency requirement passed muster under the Twenty-first Amendment. "The language of the amendment—prohibiting the 'delivery or use' of alcohol 'in violation of the laws' of each State—empowers States to regulate sales of alcohol within their borders." Pet.App.41a. In 1933, when Americans ratified the Amendment, this would

have been understood to permit regulation of purely in-state sales without regard to the dormant Commerce Clause. That is because the dormant Commerce Clause limits the states' authority only over *interstate* commerce, and purely in-state commercial conduct was not regarded as interstate commerce at the time of ratification. Pet.App.42a–46a. Thus, laws regulating who could sell alcohol within a state's borders would not have been understood to present any conflict with the dormant Commerce Clause:

> From the vista of 1933, a lawyer (and judge) would have presumed that the regulation of sales of alcohol *within* the state (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power given the existing paradigm of largely separate and exclusive spheres of [state and federal] regulatory power.

Pet.App.44a.

Against this historical "backdrop," Judge Sutton explained, this Court's Twenty-first Amendment precedents are easier to understand. Pet.App.48a. Those cases fall into two rough categories. "On one side" are cases holding that "the Commerce Clause still limits state efforts to regulate activity outside of a State's territorial domain." Pet.App.48a. "On the other side," "exceptions to the normal operation of the Commerce Clause remain alive and well in some areas," including for in-state "alcohol distribution." Pet.App.49a. In this area, state authority is "'virtually' limitless": "State regulations of in-state distribution, even if facially discriminatory [against out-of-state economic interests], are constitutional unless a challenger can show that they serve no purpose besides 'economic

protectionism.'" Pet.App.49a (quoting *Granholm*, 544 U.S. at 488, and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

Judge Sutton concluded that Tennessee's two-year durational-residency requirement fell within the latter, constitutionally permissible set of regulations. After all, *Granholm* recognized that three-tier systems are "'unquestionably legitimate,'" and that, "[a]s part of these systems, the States may require retailers and wholesalers to reside within their borders." Pet.App.49a–50a (quoting *Granholm*, 544 U.S. at 489). "And if the States may do that, they must have flexibility to define the requisite degree of in-state presence necessary for participating as a retailer or wholesaler." Pet.App.50a. Judge Sutton went on to explain that, in his view, states cannot exercise that flexibility for purely protectionist ends. But durational-residency requirements for retailers advance state interests in responsible alcohol consumption: Retailers "are closest to the local risks that come with selling alcohol, such as 'drunk driving, domestic abuse, [and] underage drinking,'" and requiring a two-year residency period "ensures that they will be knowledgeable about the community's needs and committed to its welfare." Pet.App.50a (quoting *S. Wine & Spirits v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013)). "The same is true with respect to a residency requirement for officers and directors of the retailer," which ensures that those "in a position to alter or influence the retailer's behavior" are "familiar with the community." Pet.App.51a.

Judge Sutton agreed with the majority about the part of the Tennessee law requiring every stockholder of a corporate licensee to comply with the two-year

residency requirement. That stringent requirement, he said, reflected impermissible economic protectionism. Pet.App.54a. So too for the ten-year durational-residency requirement applicable to license renewals. Pet.App.54a–55a.

5. This Court granted the Association's petition for a writ of certiorari. The petition did not seek review of the Sixth Circuit's decision as to the provisions regarding shareholders and license renewals. Thus, the only issue before the Court is whether the Twenty-first Amendment permits states to impose two-year durational-residency requirements on individuals (and the officers and directors of corporations) who apply for retail liquor licenses. *See* Cert. Reply Br. 3.

SUMMARY OF ARGUMENT

I. Tennessee's durational-residency requirement is constitutional. That conclusion follows from the constitutional text, the relevant history, and modern precedent.

A. The second section of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." That language permits states broad latitude to regulate the retail sale of alcohol free from the constraints of the dormant Commerce Clause.

The Amendment's historical context makes that clear. In addition to ending Prohibition, the Amendment was intended to "restore[] to the States the powers they had under the Wilson and Webb-Kenyon Acts." *Granholm*, 544 U.S. at 484. Congress passed these Acts in the years before Prohibition, in response to a now-overruled line of Commerce Clause decisions

that barred the states from regulating alcohol shipped interstate as long as it remained in its "original package." *Id.* at 478–82. The Wilson and Webb-Kenyon Acts made interstate shipments subject to the laws of the states to which they were shipped, thereby empowering states to regulate the distribution of *all* alcohol within state borders, whether or not it originated from out-of-state or remained in its original package. The Acts thus allowed states to channel all liquor sales through regulated distribution channels, including state monopoly systems and systems that "authorized only residents to be licensed to sell liquor, and restricted the number of such licenses." *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 451 (1898).

Americans ratified the Twenty-first Amendment after a thirteen-year experiment with Prohibition. In doing so, they rejected Prohibition—but not the temperance goals that motivated it. To the contrary, one major "purpose" of the Twenty-first Amendment was to more effectively "promote temperance." *Bacchus*, 468 U.S. at 276. Prohibition had proven that, in "the alcohol context, centralized regulation did not work." Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 Va. J. Soc. Pol'y & L. 552, 584 (2006). The Twenty-first Amendment's second section responded by "restor[ing] to the States the powers they had" in the years before Prohibition. *Granholm*, 544 U.S. at 484. This decentralized approach allowed states to pursue policies that best fit local values and conditions, and to experiment with different approaches to the difficult problems inherent in regulating the distribution and use of alcohol.

Most states used their reacquired power to "create[] either state monopolies or distribution systems" through which sales could be closely regulated. *Id.* at 496 (Stevens, J., dissenting). States that permitted private management of retail sales almost always "limit[ed] the issuance of retail . . . licenses to residents of the state or to domestic corporations." *Economic Localism*, 72 Harv. L. Rev. at 1148. Many states passed laws along these lines in the immediate aftermath of the Twenty-first Amendment's ratification. These states often issued licenses only to those who established residency over a period of years. *Infra* 34.

This Court's contemporaneous precedents left the states to do all this "unfettered by the Commerce Clause." *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). In an opinion by Justice Brandeis, issued just three years after Prohibition's repeal, the Court famously said that recognizing a Commerce Clause exception to the Twenty-first Amendment "would involve not a construction of the Amendment, but a rewriting of it." *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S 59, 62 (1936).

B. The Court later qualified these broad statements, but it did so in ways that confirm the constitutionality of durational-residency requirements. The Court distinguished between "core" and non-core § 2 powers, holding that the Twenty-first Amendment immunizes only "core" laws from dormant Commerce Clause scrutiny. The "core § 2 power" is the power "directly to regulate the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. States exercise that power when they regulate who can sell liquor and in what way. For example, states

exercise their core authority when they channel sales through a three-tier system, or require producers to sell their products to a wholesaler through an in-state resident. *Granholm*, 544 U.S. at 493; *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S 275, 277–78, 283–84 (1972). When states exercise their core authority "to restrict, regulate, or prevent the traffic and distribution of intoxicants with [their] borders," it is "unquestioned" that they face no Commerce Clause scrutiny whatever. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1963).

But laws that are not passed under this "core" power receive no such immunity. Consider laws that "regulate activity outside of a State's territorial domain." Pet.App.48a (Sutton, J., dissenting). Even though the Twenty-first Amendment confers broad authority to regulate the *in-state* distribution of alcohol, it confers no authority to regulate distribution in other states. For example, laws purporting to regulate advertisements broadcast from out of state, or regulations that have the effect of imposing price requirements on sales in other states, fall outside the Twenty-first Amendment's "core" power to regulate the in-state distribution of liquor. *See, e.g., Capital Cities*, 467 U.S. at 714–16; *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989). Such laws go beyond any power that § 2 restored to the states, so the Twenty-first Amendment does not protect them from dormant Commerce Clause scrutiny.

The Court's most recent Twenty-first Amendment case—*Granholm v. Heald*—reflects this core–non-core distinction. *Granholm* recognized that "States have broad power to regulate liquor under § 2 of the Twenty-first Amendment." 544 U.S. at 493. Because

"§ 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts," and because those Acts gave the states authority to craft their own in-state liquor-distribution laws, the Twenty-first Amendment re-empowered states to structure their distribution systems without regard to the dormant Commerce Clause. *Id.* at 484. As a result, it is "'unquestionably legitimate'" for states to "funnel sales through [a] three-tier system." *Id.* at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). Since "the requirement that liquor pass through a licensed in-state wholesaler" and retailer "is a core component of the three-tier system," *id.* at 518 (Thomas, J., dissenting), residency requirements are also unquestionably legitimate.

But the broad power conferred by the Wilson and Webb-Kenyon Acts—and thus by the Twenty-first Amendment—has limits. Neither Act displaced the "line of Commerce Clause cases striking down laws that discriminated against liquor produced out of state." *Id.* at 483 (majority). Since the Twenty-first Amendment does not authorize such laws, they cannot be justified as an exercise of § 2's "core" authority.

Consistent with this distinction between core and non-core § 2 authority, *Granholm* struck down the state laws at issue, which forbade direct-to-consumer "shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers." *Id.* at 493. In-state liquor-distribution "policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489. It is only when states discriminate against out-of-state products, and thus do what the Twenty-first Amendment does not

permit, that the Amendment ceases to provide protection from the dormant Commerce Clause.

C. Tennessee's durational-residency requirement is not subject to the dormant Commerce Clause because it is authorized by the core § 2 power "directly to regulate the sale . . . of liquor within" the state. *Capital Cities*, 467 U.S. at 713. The durational-residency requirement, which dictates who is eligible to work at the retail tier, is part of the structure of Tennessee's "unquestionably legitimate" three-tier system. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). The requirement thus "regulate[s] . . . the traffic and distribution of intoxicants within [state] borders," bringing it within § 2's core and outside the scope of the Commerce Clause. *Hostetter*, 377 U.S. at 330.

Moreover, Tennessee's durational-residency requirement easily passes muster as a reasonable exercise of legislative judgment. For one thing, the law helps ensure that state and local officials have an "opportunity to determine [a license applicant's] fitness." *See Hinebaugh*, 192 S.E. at 178. For another, it increases the odds that liquor retailers will sell responsibly, because local residents tend to be more "knowledgeable about the community's needs and committed to its welfare." Pet.App.50a (Sutton, J., dissenting). Finally, as two legislators recognized in passing the law, it is a good thing that these laws make it harder to open a liquor store, because reducing supply can help prevent alcohol abuse. BIO.App.9a.

II. The Sixth Circuit majority rejected the Association's argument based on a series of non sequiturs. For example, the majority noted that *Granholm* "de-

clined to overrule" Twenty-first Amendment precedents forbidding discrimination against out-of-state products. Pet.App.15a. The majority also stressed that *Granholm* acknowledged the "general Commerce Clause principle" that states may not discriminate against out-of-state interests. Pet.App.17a. All of that is true, but all of it accords with the principles above. State laws that discriminate against out-of-state products fall outside the "core" of § 2 and are thus subject to the dormant Commerce Clause. Only state laws authorized by the core § 2 power to regulate the distribution of alcohol are immune from "general Commerce Clause principle[s]."

The majority never acknowledged this distinction. Judge Sutton did. As he explained in dissent, the Twenty-first Amendment creates an "exception[] to the normal operation of the Commerce Clause" for state laws regulating the in-state distribution of alcohol. Pet.App.48a (quoting *Capital Cities*, 467 U.S. at 712). Liquor distribution "implicates the States' core interest after the repeal of Prohibition," and so laws regulating distribution are "protected under [§ 2] when they treat liquor produced out of state the same as its domestic equivalent." Pet.App.49a (quoting *Granholm*, 544 U.S. at 489). The majority had no answer to this, and there is none.

ARGUMENT

I. TENNESSEE'S DURATIONAL-RESIDENCY REQUIREMENT IS CONSTITUTIONAL.

"The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at

488. States may regulate the in-state sale of alcohol "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138—provided "they treat liquor produced out of state the same as its domestic equivalent," *Granholm*, 544 U.S. at 489. Regulations of liquor distribution that meet that condition "are protected under the Twenty-first Amendment." *Id.*

These principles follow from the Twenty-first Amendment's text and history. They likewise follow from this Court's precedents. Those precedents recognize that the Twenty-first Amendment restored to the states the powers they possessed under the Wilson and Webb-Kenyon Acts before Prohibition—including the almost-plenary power over in-state liquor sales. Applying that insight, this Court has held that the Twenty-first Amendment immunizes state regulations from dormant Commerce Clause scrutiny when they are enacted under the states' "core" Twenty-first Amendment power: the power "directly to regulate the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. And under these principles, Tennessee's two-year durational-residency requirement is constitutional.

A. The Twenty-first Amendment makes the dormant Commerce Clause inapplicable to most state laws regulating liquor distribution.

The second section of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Understood in its historical context, this language exempts state laws regulating the retail sale of

alcohol—its "delivery"—from dormant Commerce Clause scrutiny, at least where the laws in question treat alcohol produced in and out of state on equal terms.

*1. **Pre-Prohibition regulation of alcohol.*** Most Americans today "regard alcohol as an ordinary article of commerce." *Granholm*, 544 U.S. at 494 (Stevens, J., dissenting). For much of American history, however, many viewed it "as a lawlessness unto itself." *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941) (Jackson, J., concurring in result). State laws have long reflected that attitude, imposing special limits on the sale and production of alcohol "for the maintenance of good order and good morals." *The License Cases*, 46 U.S. (5 How.) 504, 590–91 (1847) (op. of McClean, J.).

In the mid-to-late 1800s, this Court's interpretation of the Commerce Clause sometimes stood in the way of state attempts at regulating alcohol. That clause empowers Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. This Court has held that, by expressly giving authority over interstate commerce to Congress, the Constitution implicitly takes that authority from the states. Under the "dormant" or "negative" Commerce Clause, states may not "regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

The dormant Commerce Clause has never stopped states from regulating—or even banning entirely—the in-state sale of alcohol. *See Mugler v. Kansas*, 123 U.S. 623, 657–59 (1887); Pet.App.44a (Sutton, J, dissenting). The conflict arises only when the states stray beyond "purely internal affairs" and begin to

regulate *interstate* commercial conduct. *Leisy v. Hardin*, 135 U.S. 100, 122 (1890). As applied in the late 1800s, the prohibition on state regulation of interstate commerce had at least two effects. First, it prevented states from subjecting liquor produced out of state to burdens from which in-state liquor was exempted. *See, e.g.*, *Walling v. Michigan*, 116 U.S. 446, 455 (1886) (invalidating tax imposed only on out-of-state liquor). Second, the dormant Commerce Clause left states powerless to prevent alcohol from being shipped across their borders. Under the now-rejected "original package" doctrine, courts considered alcohol shipped from other states to be an article of interstate commerce—immune from state regulation—so long as it remained in its original package. *See Leisy*, 135 U.S. at 124. This "left the States in a bind": "They could ban the production of domestic liquor, . . . but these laws were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package." *Granholm*, 544 U.S. at 478.

Congress addressed this problem. In 1890, it passed the Wilson Act, which provided that, "upon arrival in [any] State or Territory," alcohol would "be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory," regardless of whether the alcohol remained in its "original package[]." Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). With this law, Congress exercised its Commerce Clause authority to make the legality of interstate alcohol shipments contingent on the laws of the state into which

the alcohol was to be shipped. Though the Wilson Act left in place the cases banning discrimination against out-of-state liquor, it was supposed to close the original-package loophole that out-of-state sellers were using to evade generally applicable state liquor laws. *Granholm*, 544 U.S. at 478–79.

The Wilson Act partly succeeded in closing the loophole. It allowed states to regulate the in-state sale of imported liquor that remained in its original package. For example, this Court recognized that states could "authoriz[e] only residents to be licensed to sell liquor," including liquor still in its original package, "and restrict[] the number of such licenses." *Vance*, 170 U.S. at 451. Some states did indeed impose such residency requirements on retail licensees. *See, e.g.*, Neb. Stat. Rev. § 3844 (1913); R.I. Gen. Laws, ch. 123, § 2 (1909). Some states additionally imposed *durational*-residency requirements on those seeking a license to sell alcohol. *See, e.g.*, Tex. Rev. Civ. Stat., art. 7446 (1911) (two years); Ind. Code § 8323e (1914) (one year).

But this Court's interpretations of the Wilson Act left state laws regulating alcohol vulnerable to the dormant Commerce Clause. The Court held that alcohol did not "arriv[e]" in a state when it reached state lines, but rather when it reached the purchaser (also known as the "place of consignment"). *Vance*, 170 U.S. at 451; *see also Rhodes*, 170 U.S. at 426. Thus, the states' "right to regulate did not attach until the liquor was in the hands" of its initial buyer. *Granholm*, 544 U.S. at 480. So even after the Wilson Act, states could not ban out-of-state liquor from being shipped directly to consumers; the alcohol remained part of interstate

commerce, and thus immune from state regulation, until it reached the buyer.

Congress again entered the fray. In 1913, it closed the direct-to-purchaser loophole through the Webb-Kenyon Act. That law, still in effect today, "prohibit[s]" any "shipment or transportation" of alcohol into a state where it is "intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." 27 U.S.C. § 122. The Act "prevent[ed] the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws." *James Clark Distilling Co. v. W. Maryland R. Co.*, 242 U.S. 311, 324 (1917). As was true of the Wilson Act, the Webb-Kenyon Act left in place the pre-existing ban on "state laws that discriminated against liquor produced out of state." *Granholm*, 544 U.S. at 483; *but see id.* at 500 (Thomas, J., dissenting) (disputing this interpretation). But so long as states treated in-state and out-of-state alcohol identically, the Act made state laws effective against imported alcohol. Thus, in addition to the states' pre-existing ability to regulate purely in-state sales under their police power, they now had authority to regulate interstate shipments of alcohol to buyers within their borders.

2. Prohibition and repeal. This legal regime became moot with the enactment of the Eighteenth Amendment, which prohibited "the manufacture, sale, or transportation of intoxicating liquors within . . . the United States." U.S. Const. amend. XVIII. But what President Hoover called the "Noble Experiment" ended in failure. *Loretto*, 601 F. Supp. at 856 & n.7. The Eighteenth Amendment did not stop the

consumption of liquor, and did much to create a black market in which organized crime thrived. *See Maxwell's Pic-Pac*, 739 F.3d at 939; Pegram, BATTLING DEMON RUM at 173–74.

Fed up, the American people convened constitutional conventions for the first and only time since the ratification of the Constitution itself. In 1933, they ratified the Twenty-first Amendment, which repealed the Eighteenth Amendment and ended nationwide Prohibition. In addition, § 2 of the Amendment, echoing Webb-Kenyon, provided that "[t]he transportation or importation into any State . . . for *delivery or use therein* of intoxicating liquors, in violation of the laws therefore, is hereby prohibited." U.S. Const. amend. XXI, § 2 (emphasis added); *see* 27 U.S.C. § 122 (prohibiting the "shipment or transportation" of alcohol "into any State . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State").

Section 2 of the Twenty-first Amendment thus "restored" to the States those "powers they had under the Wilson and Webb-Kenyon Acts" before Prohibition. *Granholm*, 544 U.S. at 484; *id.* at 514 (Thomas, J., dissenting) (agreeing with the majority on this point); *see also, e.g.*, Richard A. Epstein, THE CLASSICAL LIBERAL CONSTITUTION 160 (Harv. Univ. Press 2014) (explaining that § 2 restored the federal-state balance to the "status quo ante"). States regained their power to regulate retail alcohol sales; both those occurring purely in-state and those occurring across state lines. The former category of regulations—those governing in-state sales and distribution—formed the core of states' Twenty-first Amendment powers. After all, "[f]rom the vista of 1933, a lawyer (and judge)

would have presumed that the regulation of sales of alcohol *within* the State (such as a residency requirement for ownership of a retail liquor store) would be an exclusive state power." Pet.App.44a (Sutton, J., dissenting); *see also Leisy*, 135 U.S. at 122 (recognizing states' power over "purely internal affairs"). And since the Webb-Kenyon Act had empowered states to subject sales made *across* state lines to the same rules as all other sales, *see James Clark*, 242 U.S. at 323–25, so too did the Twenty-first Amendment.

In restoring to the states "the power to regulate, or prohibit entirely, the transportation or importation of intoxicating liquor within their borders," *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987), the Twenty-first Amendment fulfilled at least two important policy objectives: To more effectively promote temperance, and to decentralize alcohol regulation.

First, although the Twenty-first Amendment repealed Prohibition, its "purpose" was still to "promote temperance." *Bacchus*, 468 U.S. at 276. The American people repealed the Eighteenth Amendment because centralized regulation had failed, not because they rejected the temperance movement's goals. Yablon, 13 Va. J. Soc. Pol'y & L. at 584. Thus, while the Twenty-first Amendment's first section made alcohol legal in states that allowed it, the second "was passed to ensure that . . . states had the legal tools necessary to continue to fully effectuate their temperance goals." *Id.* In this way, the Amendment served states' "interest in reducing alcohol consumption." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996).

The Amendment served another purpose too. By returning regulatory authority to the states—a funda-

mentally federalist act—the Amendment better accommodated diverse viewpoints about the proper place for alcohol in American life. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting). By trusting the states "to devis[e] solutions to difficult legal problems," *Oregon v. Ice*, 555 U.S. 160, 171 (2009), our federalist system "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry,'" *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

The failed experiment with national Prohibition showed that, if ever there were a subject for state experimentation, it was "demon rum." *Granholm*, 544 U.S. at 496 (Stevens, J., dissenting). The personal and communal dangers of alcohol consumption are complex and profound. And—as Prohibition's demise amply showed—no single regulatory solution had proven up to the challenge. Indeed, no single solution *could* solve the puzzle of how best to regulate alcohol. As much in 1933 as today, community tolerance for alcohol consumption and the resulting social dangers varied from region to region. *See* Raymond B. Fosdick & Albert L. Scott, TOWARD LIQUOR CONTROL 10 (Harper & Bros. 1933).

The Twenty-first Amendment, which replaced a national regulatory regime with a state-by-state system, reflected the federalist ideal. It allowed each state to determine how much of a problem alcohol posed and to craft its own solution. "So-called 'dry states' entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors." *Granholm*, 544 U.S. at 496 (Stevens, J., dissenting). The Twenty-first Amendment freed each state to choose the regulatory regime that best served its needs.

3. Post-repeal legislation. Legislation passed in the immediate aftermath of an amendment's ratification is often good evidence of the amendment's meaning. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014). The state laws passed after the Twenty-first Amendment's ratification confirm that it permits state regulation of retail sales in general and durational-residency requirements in particular.

After Prohibition, the vast majority of states legalized the sale and use of alcohol to some degree. *See* Skilton, 7 Brook. L. Rev. at 345 & n.14. But the concern for public safety remained, especially given the "huge, sprawling, and illegal industry for producing and distributing alcoholic beverages" that "already existed." Levine, Contemp. Drug Probs. 63. "The difficulty lay in the need for reconciling two conflicting but equally desirable ends: the limitation of the liquor traffic within the narrowest bounds because of the proven danger inherent in the use of alcohol, and the avoidance of [a] too great restriction [that] would

make for law violation." Harrison & Laine, AFTER REPEAL 42.

Most states steered between these hazards by dividing and separately licensing producers, wholesalers, and retailers. *See* Skilton, 7 Brook. L. Rev. at 349–50. At the retail tier, "States that made liquor legal imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within state borders." *Granholm*, 544 U.S. at 517 (Thomas, J, dissenting); *see* Skilton, 7 Brook. L. Rev. at 349–50. Those states that permitted private management of retail sales almost always "limit[ed] the issuance of retail . . . licenses to residents of the state or to domestic corporations." *Economic Localism*, 72 Harv. L. Rev. at 1148.

Consider, for example, the following state laws from the post-repeal era imposing residency requirement on retailers: Ariz. Rev. Stat. Ann. § 1886d (Supp. 1936); Colo. Rev. Stat. Ann., ch. 89, § 4(a) (1935); Idaho Code Ann. § 18-130 (Supp. 1940); Ill. Liquor Control Act of 1934, art. VI § 2(1); Iowa Code § 1921.019(1) (1939); Ky. Rev. Stat. § 243.100(3) (1942); 1933 Mass. Acts. 753 § 15; 1 Md. Code Ann., art. 2B, § 13(4) (1939); 1 Mo. Rev. Stat. § 4906 (1939); Neb. Comp. Stat. § 53-328 (1929 & Supp. 1941); N.J. Rev. Stat. § 33:1-25 (1937); N.C. Gen. Stat. § 3411(103)(1½) (1939); Ohio Rev. Code. Ann. § 6064-17 (1936); 20 R.I. Gen. Laws Ann., ch. 163, § 4 (1938); 1939 Tenn. Pub. Acts, ch. 49 §8; Vt. Rev. Stat., Tit. 28, ch. 271, § 6156 (1947); Wis. Stat. § 176.05(9) (1937); Wyo. Comp. Stat. § 53-204 (1945); *see also, e.g.*, Mich. Comp. Laws § 9209-29 (Supp. 1935) (allowing distrib-

utors to obtain retail license if they are Michigan citizens); N.D. Rev. Code § 5-0202 (1943) (any legal resident of North Dakota can sell beer in lawful business).

In addition, states often required "a fixed period of prior residence." *Economic Localism*, 72 Harv. L. Rev. at 1148. Beyond ensuring that licensees would be "amenable to the direct process of the state courts," these laws ensured a genuine "opportunity to determine [a license applicant's] fitness" and created "a bar against undesirable nonresidents coming into the state for the sole purpose of" selling alcohol. *Hinebaugh*, 192 S.E. at 178. To this end, New Jersey required a full five years of in-state residence. *See* N.J. Rev. Stat. § 33:1-25. And a number of states imposed residency requirements of up to two years, just as Tennessee does today. *See, e.g.*, Idaho Code Ann. § 18-130 (two years); *accord, e.g.*, Iowa Code § 1921.019(1) ; 1 Md. Code Ann., art. 2B, § 13(4); 1939 Tenn. Pub. Acts, ch. 49 § 8; *see also, e.g.*, 1937 Ga. Laws 103 § 24 (one year); *accord, e.g.*, Ky. Rev. Stat. § 243.100(3); N.C. Gen. Stat. § 3411(103)(1½); Ohio Rev. Code. Ann. § 6064-17; Wis. Stat. § 176.05(9); Wyo. Comp. Stat. §53-204; Vt. Stat. Ann., tit. 28, ch. 271, § 6156 (must be listed for poll taxes within past year).

States enforced residency requirements against companies too. They sometimes did so through direct regulation of corporate or firm residency. *See, e.g.*, Colo. Rev. Stat. Ann., ch. 89, § 4(a); N.C. Gen. Stat. § 3411(103)(1½); *accord* 1937 Ga. Laws 103 § 24 (applying durational-residency requirement to any "person" who applies for a license, defined in § 5(c) of the act to include "any . . . partnership, corporation, or as-

sociation"). Other states indirectly regulated businesses by imposing residency restrictions on partners, directors, officers, or shareholders. New Jersey, for instance, required all partners to individually meet its residency requirements, *see* N.J. Rev. Stat. § 33:1-25, and Ohio required a majority of corporate "members" to do so, *see* Ohio Rev. Code. Ann. § 6064-17. Other states enacted similar rules. *See, e.g.*, Wyo. Comp. Stat. § 53-204 (partners, along with officers and stockholders, must individually satisfy requirements); Wis. Stat. § 176.05(9) (each officer and director of corporation must individually qualify).

The states' three-tier schemes and their accompanying retailer-specific residency requirements were seen as "unquestionably legitimate," just as they are today. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). Again, this Court had recognized that states could restrict retail licenses to state residents *even before* the Webb-Kenyon Act strengthened state control over liquor. *See Vance*, 170 U.S. at 451. And if states had that power, they necessarily had the "flexibility to define the requisite degree of 'in-state' presence." Pet.App.50a (Sutton, J., dissenting) (quoting *S. Wine*, 731 F.3d at 810). It is unsurprising, then, that no one seems to have doubted the legality of durational-residency requirements in the years after repeal. Indeed, even those challenging liquor-license denials in court would *concede* the constitutionality of such restrictions and seek relief on other grounds. *See Premier-Pabst Sales Co. v. Grosscup*, 298 U.S. 226, 227–28 (1936) (petitioner conceded constitutionality of Pennsylvania law limiting retail licenses to corporations with officers, direc-

tors, and 51 percent of stockholders that had been residents for at least two years); *accord Hinebaugh*, 192 S.E. at 179 (upholding durational-residency requirement applicable to distributors without even addressing the Commerce Clause). It is similarly unsurprising that, almost a century later, all nine justices in *Granholm* wrote or joined opinions that examined the foregoing history and expressly recognized the unquestioned legitimacy of three-tier systems in general and in-state presence requirements in particular. *See* 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J, concurring in the judgment)); *id.* at 518 (Thomas, J, dissenting).

* * *

The Twenty-first Amendment, read in its historical context, is properly understood as restoring the states' traditional authority to regulate the retail sale of alcohol. The core responsibility assigned to the states by the Twenty-first Amendment is the regulation of liquor distribution. States therefore have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." *North Dakota*, 495 U.S. at 431 (plurality op.) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). They can regulate wholesale and retail sales as they wish, provided they subject in-state and out-of-state alcohol to the same terms. *Granholm*, 544 U.S. at 489. Durational-residency requirements—which regulate in-state liquor sales without discriminating against out-of-state products—are therefore constitutional.

B. Precedent establishes that the dormant Commerce Clause does not apply to "core" exercises of Twenty-first Amendment authority.

Immediately after ratification, this Court understood the Twenty-first Amendment as allowing states to regulate alcohol "unfettered by the Commerce Clause." *Ziffrin*, 308 U.S. at 138. Indeed, Justice Brandeis, writing for the Court, stated that any contrary interpretation "would involve not a construction of the Amendment, but a rewriting of it." *Young's Market Co.*, 299 U.S. at 62.

The Court qualified that broad reading a few decades later. Beginning in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court recognized that "the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and that, because both address the division of authority between the federal and state governments, "each must be considered in the light of the other." 377 U.S. at 332. Even under this qualified approach, however, the Twenty-first Amendment permits the states to regulate alcohol unfettered by the Commerce Clause when they exercise their "core § 2 power": the power "directly to regulate the sale or use of liquor within [state] borders." *Capital Cities*, 467 U.S. at 713. Only when states enact liquor laws outside this core power are they subject to dormant Commerce Clause scrutiny.

Core laws. It is "unquestioned" that states are unfettered by the Commerce Clause when they exercise their "power to restrict, regulate, or prevent the traffic and distribution of intoxicants within [their] borders." *Hostetter*, 377 U.S. at 330. As this Court has repeatedly put it, the "Twenty-first Amendment

grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *Midcal*, 445 U.S. at 110); *North Dakota*, 495 U.S. at 431 (plurality op.) (quoting *Midcal*, 445 U.S. at 110). This allows states to "structure the[ir] liquor distribution systems" to best serve their policy goals and the needs of their populations.

In light of these principles, state laws that "funnel sales through [a] three-tier system" are "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). In *North Dakota*, for example, the Court considered a three-tier system of liquor distribution; one that distinguished among "out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers." 495 U.S. at 428. North Dakota law, like that of many other states, provided that suppliers could "sell to only licensed wholesalers or federal enclaves," and that "[l]icensed wholesalers" could sell to licensed retailers, other licensed wholesalers, and federal enclaves. *Id.* In rejecting a Supremacy Clause challenge to certain aspects of this regime, the Court stressed that North Dakota's regulatory scheme fit "within the core of the State's power under the Twenty-first Amendment." *Id.* at 432.

This Court has also upheld laws that permit producers to transfer liquor to in-state wholesalers only through a "resident representative." *Heublein*, 409 U.S. at 277, 283–84. In *Heublein*, this Court held that such laws are "an appropriate element in the State's system of regulating the sale of liquor" and thus are protected by the Twenty-first Amendment from

dormant Commerce Clause scrutiny. *Id.* at 283. "This Court made clear in the early years following the adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.* (quoting *Hostetter*, 377 U.S. at 330).

Similarly, this Court has recognized that the Twenty-first Amendment bolsters state authority to ban the sale and consumption of alcohol at nightclubs. *California v. LaRue*, 409 U.S. 109, 114–16 (1972). "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *Id.* at 114. And in upholding California's regulatory scheme, the Court rebuffed the challengers' efforts to second-guess state officials' legislative judgments. It reasoned that "wide latitude as to choice of means to accomplish a permissible end must be accorded to" the State for the exercise of its "power under the Twenty-first Amendment." *Id.* at 116.

A later decision "disavow[ed]" *LaRue*'s reasoning "insofar as it relied on the Twenty-first Amendment" to uphold a state law against a *free-speech* challenge. *44 Liquormart*, 517 U.S. at 515. Rightly so: While the "Twenty-first Amendment limits the effect of the dormant Commerce Clause," it "'does not license the States to ignore their obligations under other provisions of the Constitution." *Id.* at 416 (quoting *Capital*

Cities, 467 U.S. at 712). But this Court has never questioned *LaRue*'s recognition that the distribution of liquor is within the core of authority that the Amendment grants to the states. Neither has it doubted *LaRue*'s suggestion that states must be given "wide latitude" to regulate alcohol distribution as they see fit. 409 U.S. at 116.

These precedents illustrate that, when states exercise their "core power" to regulate the system through which in-state sales are made, their regulations are "protected under the Twenty-first Amendment"—and unfettered by the dormant Commerce Clause. *Granholm*, 544 U.S. at 489.

Non-core laws. This raises the question of which laws fall outside the states' core power "directly to regulate the sale or use of liquor within" state borders. First, that category includes laws that attempt "to regulate activity outside of a State's territorial domain." Pet.App.48a (Sutton, J., dissenting). For example, a ban on alcohol-related television advertisements broadcast from other states does not constitute an exercise of "core" Twenty-first Amendment power. *Capital Cities*, 467 U.S. at 714. Similarly, this Court has held that states stray from their core authority when they enact price-affirmation statutes—that is, laws requiring that alcohol be sold at prices no higher than those charged in surrounding states. *See, e.g.*, *Healy*, 491 U.S. at 343; *Brown-Forman Distillers Corp., v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986). Such laws, the Court emphasized, "have the inherent practical extraterritorial effect of regulating liquor prices in other States" because they prevent entities from engaging in competitive pricing

elsewhere. *Healy*, 491 U.S. at 343; *see also id.* at 335–39.

In addition to regulating out-of-state conduct, such laws are unrelated to the structure of the alcohol distribution system, the responsibility for which the Twenty-first Amendment leaves to the states. *Granholm*, 544 U.S. at 489. They do not, for example, regulate who can sell alcohol to whom and in what way—or, in the words of the Twenty-first Amendment, the "delivery or use" of alcohol within a state. As *Granholm*, *Heublein*, and *LaRue* recognized, state laws that regulate the "delivery or use" of alcohol within a state are at the heart of the Twenty-first Amendment; *those* are the regulations that are immune from dormant Commerce Clause scrutiny as direct regulations of alcohol sales within state borders. *See Granholm*, 544 U.S. at 488; *Heublein*, 409 U.S. at 277; *LaRue*, 409 U.S. at 114–15.

Another category of non-core laws consists of state regulations that fail to "treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. Such laws are not exercises of the "core powers of § 2" because they are not authorized by the Twenty-first Amendment at all. That is because the Amendment—which, again, addresses the "delivery or use" of alcohol, not its production—does not empower states to pass laws that discriminate against out-of-state products. As explained above, and in *Granholm*, states had no power to pass laws that discriminated against out-of-state products before Prohibition. That remained true even after Congress passed the Wilson and Webb-Kenyon Acts, which did not "displace" the "line of Commerce Clause cases striking down state laws that discriminated

against liquor produced out of state." *Granholm*, 544 U.S. at 483. The Twenty-first Amendment simply restored state authority over alcohol regulation by effectively constitutionalizing Webb-Kenyon; it did not create new regulatory powers. *Supra* 29–30; *Granholm*, 544 U.S. at 483. So, as before, states were left without authority to discriminate against out-of-state liquor. *Granholm*, 544 U.S. at 484–85. State laws that purport to do so are outside the Amendment's scope altogether—and subject to the dormant Commerce Clause. *Id.* at 485–86.

The Court applied this core–non-core distinction in *Bacchus*. That case concerned a Hawaii law that exempted locally produced liquors, and only those liquors, from otherwise-applicable sales taxes. 468 U.S. at 265. The State did not "seek to justify its tax on the ground that it was designed to promote temperance or carry out any other purpose of the Twenty-first Amendment," *id.* at 276; it was "undisputed" that the law served no purpose other than pure economic protectionism, *id.* at 271. Still, the State argued that, even if "the tax exemption violat[ed] ordinary Commerce Clause principles, it [was] saved by the Twenty-first Amendment." *Id.* at 274. The Court disagreed. It explained that the Twenty-first Amendment shields state laws from the Commerce Clause only when "the principles underlying the Twenty-first Amendment are sufficiently implicated . . . to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275. And since the Twenty-first Amendment provides no authority to discriminate against out-of-state products, Hawaii's law was not an exercise of the Twenty-first Amendment's "central purpose." *Id.* at 276. In other words, because Hawaii

did not pass its tax law pursuant to the core § 2 power to regulate the distribution of alcohol, the Twenty-first Amendment did not shield that law from the dormant Commerce Clause.

In his dissent below, Judge Sutton read *Bacchus* to stand for the even broader proposition that the Twenty-first Amendment provides no shelter for *any* state liquor laws that "serve no purpose besides 'economic protectionism.'" Pet.App.49a (quoting *Bacchus*, 468 U.S. at 276). Because Tennessee's law is amply justified by legitimate, non-protectionist concerns, the Court need not decide whether the Twenty-first Amendment contains a general, economic-protectionism exception. *Infra* 47–51.

But *Bacchus* does not create such an exception anyway. True, it says that state laws constituting "mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 468 U.S. at 276. But the Court made that comment while discussing a law that discriminated between in-state and out-of-state products. Thus, *Bacchus* stands only for the principle that laws that discriminate against out-of-state alcohol fall outside the Twenty-first Amendment's scope—the same principle that this Court recognized in *Granholm*. The Court did not purport to adopt a rule prohibiting protectionist liquor laws generally. That would require departing from the long-settled principle that states may regulate alcohol under the Twenty-first Amendment "without let or hindrance by courts regarding the 'reasonableness'" of their laws. *Carter v. Virginia*, 321 U.S. 131, 143 (1944) (Frankfurter, J., concurring). A bar on protectionist laws would amount to reasonableness review:

In each future case, the Court would have to decide whether the law in question is supported by serious-enough non-protectionist interests; a form of review that would bog down the courts in policy disputes and leave the states with little certainty as to the validity of their liquor laws. That result is irreconcilable with the determination by the "people of the United States," reflected in the Twenty-first Amendment, that the level of state control over liquor regulation "should be governed by a specific and particular constitutional provision," not left "to the courts." *Duckworth*, 314 U.S. at 398 (Jackson, J., concurring in result).

* * *

This Court's precedents confirm that the Twenty-first Amendment leaves states with virtually complete control over the structure of their in-state alcohol-distribution systems. The qualifier "virtually" is needed because the Amendment does not permit laws that discriminate against out-of-state goods. But when it comes to structuring a liquor distribution system, state "policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489.

C. Tennessee's two-year durational requirement is constitutional.

1. These principles establish the constitutionality of durational-residency requirements, including Tennessee's. The Twenty-first Amendment restored the states' longstanding power, abridged only briefly by the Eighteenth Amendment, over purely in-state alcohol sales. The states exercised that newly regained

power by enacting residency and durational-residency requirements for retailers. *Supra* 32–36. And eighty years of precedent have done nothing to call the legality of these laws into question, or otherwise to water down the states' authority to decide who may sell alcohol at retail within their borders. To the contrary, precedent confirms the constitutionality of durational-residency requirements. When states impose durational-residency requirements on retailers, they "directly . . . regulate the sale . . . of liquor within their borders." *Capital Cities*, 467 U.S. at 713. Such requirements treat "liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. Thus, states exercise their "core § 2 power" when they enact durational-residency requirements, *Capital Cities*, 467 U.S. at 713, immunizing those requirements from Commerce Clause scrutiny.

That is especially clear when it comes to durational-residency requirements, like Tennessee's, applicable to retailers within a state's three-tier system. Again, *Granholm* establishes that such systems are "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality op.)). It also establishes that, in using this unquestionably legitimate form of liquor regulation, states can "require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in the judgment) (quoted in *Granholm*, 544 U.S. at 489). The same goes for retailers. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190–91 (2d Cir. 2009). Thus, to challenge the validity of residency requirements on retailers is to "challeng[e] the three-tier system itself." *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006)

(op. of Niemeyer, J.); *see also Arnold's Wines*, 571 F.3d at 190–91. If three-tier systems are unquestionably valid, so are in-state residency requirements.

And so are *durational*-residency requirements. If states may impose in-state residency requirements, they must have the ability "to define the requisite degree of 'in-state presence' necessary for participating as a retailer or wholesaler." Pet.App.50a (Sutton, J., dissenting) (quoting *S. Wine*, 731 F.3d at 810). As is true in all of constitutional law, the power to do something implies the power to do so effectively. *See McCulloch v. Maryland*, 17 U.S. 316, 409 (1819); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 17 (2013). Thus, the power to require residency implies the power to define residency.

2. It is no answer to say that the Twenty-first Amendment implicitly dictates some level of in-state presence that makes one a "resident" for purposes of durational-residency laws. It does not. States impose varying durational-residency requirements in any number of contexts, and their power to do so is uncontroversial. *Compare* Cal. Educ. Code § 68017 ("A 'resident'" for in-state tuition purposes "is a student who has residence . . . in the state for more than one year") *with* Cal. Fam. Code § 2320(a) (party seeking divorce must be "resident of this state for six months and of the county in which the proceeding is filed for three months next preceding the filing of the petition"). It would be bizarre if they lacked the power to do so in a realm in which the Constitution expressly authorizes them to regulate: in-state alcohol distribution.

Taking from the states the ability to define what constitutes enough in-state presence would also un-

dermine one of the Twenty-first Amendment's primary purposes: empowering states to experiment with the best ways of regulating alcohol sales. Many states share Tennessee's judgment that durational-residency requirements play an important role in ensuring the responsible consumption of alcohol. *See* Pet. 24 n.3 (collecting state statutes). Others have chosen different means of achieving that end. But that is precisely the point: States, not courts, get to decide which regulatory regimes best suit their particular needs and preferences. And, when it comes to the regulation of in-state sales and distribution, litigants do not get to come to court and insist "that the same results could have been accomplished" through different means." *LaRue*, 409 U.S. at 116. It may be that there is no perfect solution when it comes to alcohol regulation. It may also be that the best solution differs from state to state. Given the complex and varying nature of the issue, it is far better to have "fifty-one imperfect solutions rather than one imperfect solution." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 216 (2018). Tennessee's decision to require that retailers become true members of a community before selling alcohol to its residents thus exemplifies the federalist values inherent in the Twenty-first Amendment.

3. To the extent it matters, there are good, non-protectionist public-policy reasons for Tennessee's durational-residency law. In the same statute that imposes the durational-residency requirement, Tennessee's legislature codified that requirement's purpose:

> Because licenses granted under this section include the retail sale of liquor, spirits and high

> alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state . . . .

Tenn. Code Ann. § 57-3-204(b)(4).

Since the repeal of Prohibition, states have imposed durational-residency requirements for these very reasons. Such requirements ensure that the party in charge of distributing alcohol—a potentially dangerous product—is "amenable to the direct process of the state courts, as a bona fide resident." *Hinebaugh*, 192 S.E. at 178. They also permit a "better opportunity to determine [an applicant's] fitness," and create a "bar against undesirable nonresidents coming into the state for the sole purpose of becoming distributors." *Id.* By limiting retailer's licenses to those over whom the state has a "higher degree of oversight" and "control," Tenn. Code Ann. § 57-3-204(b)(4), the state facilitates its review of retail-license applications. The requirement is especially important for facilitating review by local officials, from whom retail-license applicants must seek a certificate of qualification, *id.* at § 57-3-208, who generally lack the states' investigatory resources.

In addition to all this, the two-year residency requirement for liquor retailers increases the odds "that

they will be knowledgeable about the community's needs and committed to its welfare." Pet.App.50a (Sutton, J., dissenting). Retailers form the "final link in the distribution chain" of alcohol, and are thus "closest to the local risks" related to its sale, such as 'drunk driving, domestic abuse, [and] underage drinking." Pet.App.50a (Sutton, J., dissenting) (quoting *S. Wine & Spirits*, 731 F.3d at 811). The long-time resident who attends football games on Fridays is less likely to be duped by the drum major's fake ID on Saturdays. She is also less likely to do business with the town drunk if she knows he will drive around on the same streets that her family and friends use.

The idea that those who better know a community better serve it is hardly foreign. Indeed, the Constitution, which sets a 14-year durational-residency requirement for the President, reflects that very notion. *See* U.S. Const. art. II, § 1, cl.2. It also "may explain why Congress requires federal court of appeals judges to live within their circuits." Pet.App.50a (Sutton, J., dissenting) (citing 28 U.S.C. § 44(c)). It likely explains why state and local governments often impose durational-residency requirements on those who wish to serve the community as police officers or elected officials. *See, e.g.*, Mo. Stat. § 542.190; Me. Const. art. V, Pt. 1, § 4; Tex. Const. art. III, § 6. And it almost surely explains why jurisdictions impose these requirements on those who wish to work in businesses—from pawn shops to gambling facilities to adult-entertainment stores—that risk degrading the local community or facilitating crime if improperly managed. *See, e.g.*, McDonough, Georgia Code of Ordinances, Tit. 5, ch. 5.40.030(A)(b); Ala. Code § 45-32-150.05(3); Manhattan, Kansas Code of Ordinances § 5-68.

All of this more than justifies the two-year durational-residency requirement for individual license applicants—and certainly shows that the requirement cannot be dismissed as mere economic protectionism. "The same is true with respect to a residency requirement for officers and directors of" corporate retailers, such as the one Tennessee imposes. Pet.App.51a (Sutton, J., dissenting). Such requirements ensure that those "in a position to alter or influence the retailer's behavior" are familiar with the community's needs. Pet.App.51a (Sutton, J., dissenting). Tennessee's "legislature legitimately could believe that a [retailer] governed predominantly by [Tennessee] residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities . . . that liquor distribution may produce." *S. Wine*, 731 F.3d at 811.

The durational-residency requirements also further the Twenty-first Amendment's purpose of encouraging temperance. They do so by making it harder to purchase and sell alcohol, thus discouraging its use. The effect may be indirect, but it is also intentional. Discussion on the House floor during a 1984 amendment to Tennessee's residency requirements centered around the relationship between residency requirements and reduced alcohol consumption.

> Rep. Covington: Actually this might cut down on the sale of liquor in the state of Tennessee and prevent more people from getting drunk, more drunks on the streets. Is that what you're trying to do in effect?

> Rep. Rhinehart: I'm trying to restrict the sale of it [liquor], yes sir.

BIO.App.9a. As these legislators recognized, durational-residency requirements like Tennessee's promote temperance by preventing out-of-state retailers from setting up shop and selling to residents the minute they establish an in-state corporate entity. The result? Fewer "drunks on the streets," *id.*—exactly the goal the Twenty-first Amendment was intended to serve. *See Bacchus*, 468 U.S. at 276; *44 Liquormart*, 517 U.S. at 504.

To be sure, restricting the supply of consumer products is not always a good thing. But alcohol is not a typical product. When it comes to a dangerous and addictive drug like alcohol, reasonable minds can differ about the virtues of a large, low-cost supply. Indeed, one major concern in the pre-Prohibition era was the *excess* of competition, spurred by the tied-house system, which drove down prices and encouraged overserving. Pegram, BATTLING DEMON RUM at 96–97; Kerr, ORGANIZED FOR PROHIBITION at 23–24. In the aftermath of Prohibition's repeal, almost every state banned the tied-house system, apparently concluding that the virtues of competition did not outweigh its costs. Pegram, BATTLING DEMON RUM at 186. The Twenty-first Amendment bolstered their authority to do so—to inhibit competition in furtherance of moderation. Promoting "the excess of the drunkard" is not "a constitutional duty." *The License Cases*, 46 U.S. (5 How.) at 591 (op. of McLean, J.).

* * *

People might fairly debate whether the benefits of durational-residency restrictions outweigh their

costs. But the Constitution "does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). That is particularly true where alcohol is concerned. The Twenty-first Amendment affords States special leeway to craft regulatory regimes that, in their view, protect their citizens from the dangers of drinking. It does not permit courts to second-guess those decisions in the name of the dormant Commerce Clause. But even if it did, Tennessee's laws would easily survive whatever limited scrutiny such laws receive.

II. THE DECISION BELOW WAS WRONG.

In striking down Tennessee's durational-residency requirement, the Sixth Circuit fundamentally misunderstood the meaning of the Twenty-first Amendment and this Court's precedents. The panel majority gave "six reasons" for holding that, notwithstanding the Twenty-first Amendment, Tennessee lacked authority to require retailers, or their corporate principals, to reside in-state for two years before becoming eligible for a license. Pet.App.15a. Each misses its mark.

First, the majority emphasized that "the Supreme Court explicitly declined to overrule *Bacchus* in *Granholm*." Pet.App.15a. That is true, of course. But *Bacchus* is consistent with *Granholm*: Both cases simply recognize that the Twenty-first Amendment does not empower states to discriminate against out-of-state *products*. Because durational-residency requirements do nothing of the sort, neither *Granholm* nor *Bacchus* undermines their constitutionality.

Second, the majority noted that *Granholm*, like *Bacchus*, described "a general Commerce Clause principle: the prohibition of discrimination against out-of-state economic interests." Pet.App.17a. Of course, the dormant Commerce Clause *generally* prohibits states from discriminating against out-of-state interests—an important background principle that *Granholm* necessarily recognized in adjudicating a dormant Commerce Clause challenge. But just as *Granholm* did not overrule *Bacchus*, neither did it overrule precedents recognizing that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause." *Capital Cities*, 467 U.S. at 712. And *Granholm* itself held that "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489. Just so here.

Third, the Sixth Circuit majority noted that "the flow of products across state lines is not the sole concern under the dormant Commerce Clause." Pet.App.16a; *see also* Pet.App.18a–19a. That is true, but irrelevant. Again, the Twenty-first Amendment—which, like the Commerce Clause, speaks to the division of authority between the federal and state governments—empowers states to regulate the in-state sale and distribution of alcohol *without regard* to what the dormant Commerce Clause might otherwise require.

Fourth, again citing *Granholm*, the majority emphasized that alcohol regulation is not immune from scrutiny under the dormant Commerce Clause. *See* Pet.App.19a–20a. That is of course true: If alcohol-related regulations were immune from dormant Commerce Clause scrutiny, none would ever have been

struck down under the Commerce Clause. What the panel majority missed is the line—derived from the constitutional text, historical context, and this Court's precedents—between laws that implicate the core purposes of the Twenty-first Amendment (regulations of the in-state sale or distribution of alcohol), and laws that do not (such as regulations of out-of-state conduct). As explained above, it is only when States exercise their core Twenty-first Amendment authority, by regulating the *in-state sale or distribution* of alcohol, that their laws are protected from dormant Commerce Clause scrutiny. And that is the case here.

Fifth, the majority reasoned that "a state's alcoholic-beverages law is not immune simply because it is part of a three-tier system." Pet.App.20a. That is a strawman. Of course, *Granholm* recognized that the basic structure of such systems is "unquestionably legitimate." 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432 (plurality)). But that is the consequence of the broader constitutional principles *Granholm* described, not a rule in itself. *Granholm*'s point was that the Twenty-first Amendment empowers states to regulate the in-state sale and distribution of alcohol in whatever manner they choose (be it through a three-tier system or otherwise) so long as they do not regulate out-of-state conduct or discriminate against out-of-state products. *Supra* 23–44. Tennessee's durational-residency requirement is protected because it fits that bill—not simply because it is part of Tennessee's three-tier system.

Finally, the majority noted that *Granholm* held neither that "the Commerce Clause applies only to alcoholic-beverages laws regarding producers" nor that the "Twenty-first Amendment automatically protects

laws regarding wholesalers and retailers." Pet.App.22a, 23a. That has never been the Association's argument. The Twenty-first Amendment does not protect state regulatory regimes that discriminate against out-of-state *products*. *See Granholm*, 544 U.S. at 489. Nor does it cover laws that regulate out-of-state conduct, regardless whether the law implicates wholesalers or retailers. But when it comes to the regulation of the in-state sale or distribution of alcohol, *Granholm* was clear: State "policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.*

The whole of these six points is no greater than the sum of its parts. Like the Fifth Circuit's decision in *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016), on which the Sixth Circuit majority relied, the Sixth Circuit's majority decision neglected the text of the Twenty-first Amendment and its historical context. It also missed the precedential forest for the trees, fixating on a few stray lines from *Granholm* and *Bacchus* without paying any heed to the broader precedential landscape or offering a workable rule going forward.

By focusing on the Twenty-first Amendment's text and history alongside this Court's precedents, the Association has offered a workable rule that is true to both: So long as "they treat liquor produced out of state the same as its domestic equivalent," *Granholm*, 544 U.S. at 489, states may regulate the in-state sale of alcohol "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138. That describes Tennessee's law exactly.

CONCLUSION

This Court should reverse the Sixth Circuit, and hold that Tennessee's two-year durational-residency requirement is a permissible exercise of its Twenty-first Amendment authority.

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Respectfully submitted,

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